BANK PUSAT KERJASAMA BHD. (IN RECEIVERSHIP)

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[ORIGINATING MOTION NO. R2-25-07-93]
22 AUGUST 1994

INDUSTRIAL LAW: Industrial Court making award striking off second respondents claim for wrongful dismissal - Second respondent applying for reinstatement of case - Industrial Court making award setting aside earlier award and reinstating case - Applicant making application for order of certiorari to quash award of reinstatement - Whether Industrial Court has power to set aside earlier award and reinstate claimant's case - Consideration of s. 29(g) of the Industrial Relations Act 1967 - Application of s. 40 of the Interpretation Act 1967.

The second respondent filed an action in the Industrial Court contending that his dismissal from the services of the applicant was without just cause or excuse. The applicant questioned the jurisdiction of the Industrial Court to hear the matter on the grounds that, as the applicant was placed under receivership, leave of the High Court was necessary to hear the matter.

The hearing before the Industrial Court was adjourned a number of times to await the outcome of a related *certiorari* proceedings involving the applicant and its employees in the High Court. The Industrial Court subsequently fixed the case for hearing on 17 August 1992. On the said date the second respondent was absent and the Industrial Court made an award (the first award) striking out the case. The second respondent made an application to set aside the first award and to have the case reinstated. On 20 October 1992 the Industrial Court made an award (the second award) setting aside the first award and reinstating the second respondents case.

The applicant applied for an order of *certiorari* to quash the second award on the grounds that the Industrial Court did not have the power to act as it did.

Held:

[1] The finality and conclusiveness of any award is subject to the qualifying words "Subject to this Act and the provisions of s. 33A" appearing at the beginning of s. 33B of the Industrial Relations Act 1967 (the Act). The provisions of s. 33A of the Act are not relevant but the words "subject to this Act" are very material. This is so as the first respondent is empowered by s. 30(5) of the Act to act according to equity and good conscience without regard to technicalities and legal form. In this instance, the conduct of the second respondent is most relevant to determine whether he can successfully appeal to the good conscience of the first respondent to have his case reinstated.

[2] The second respondent's explanation for being absent for the hearing on 17 August 1992, namely that he regarded that date to be a mention date as at that period of time the issue of leave had not yet been decided by the High Court, was a reasonable one. All along the parties had taken the stand that the future conduct of the second respondent's case would depend on the outcome of the High Court proceedings regarding leave. It was principally for this reason that all previous hearing dates before 17 August 1992 were adjourned to await the outcome of the High Court proceedings.

[3] In addition, from the time the applicant was placed under receivership, it had taken the stand that the second respondent must obtain leave to prosecute it and such objection would be raised as a preliminary objection at the hearing. Yet on 17 August 1992, in the absence of the second respondent, no such objection was raised by the applicant as seen from the first award handed down by first respondent. The applicant was content to go along with the first respondent when the case was struck out, being fully aware that the proceedings in the High Court for leave was still pending and by so doing, the applicant, had stolen a march on the second respondent.

[4] Section 29(g) of the Act is an enabling subsection and the approach that should be adopted when interpreting such provisions is that set out by s. 40 of the Interpretation Act 1967. Since s. 29(g) of the Act enabled the first respondent to strike out the second respondent's case without its merits being heard, likewise the power to reinstate the very same case on good grounds being shown can be implied to the subsection, bearing in mind that the object of reinstatement is to give the second respondent an opportunity of being heard. To that end, the second award has been properly made within the framework of the Act.

[5] The respondents contention, that the Receivers had no *locus standi* to continue the present proceedings as they had been discharged by the Court, is a non-issue. The instant proceedings were commenced when the Receivers had not yet been discharged, and while an amendment would be in order to reflect the proper parties representing the applicant, the absence of such an amendment had not prejudiced anybody.

[Applicant's application for orders of certiorari and prohibition dismissed with costs].

Awards referred to:
Bank Pusat Kerjasama Bhd. v. Mohamad Najib b. Abu Bakar [1992] 2ILR 409 (Award No. 222/92)
Bank Pusat Kerjasama Bhd. v. Mohamad Najib b. Abu Bakar [1992] 2ILR 91 (Award No. 346/92)
Carlsberg Brewery Malaysia Berhad v. National Union of Drink Manufacturing Industry Workers [1990] 2 ILR 468 (Award No. 313/90)

Case referred to:
Lee Wah Bank Ltd. v. National Union of Bank Employees [1981] 1 MLJ 169 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3), 29(g), 30(5), (9), 33B(1), (2), 56(1)
Interpretation Act 1967, s. 40

For the applicant - Peh Lee Kheng; (Thavalingam Thavarajah with her); M/s Shearn Delamore & Co.
For 2nd respondent - V. K. Lingam (Adam Bachik with him); M/s. V. K. Lingam & Co.

JUDGMENT

Siti Norma bte Yaakob J:
This is an application for an order for *certiorari* to quash Award No.346/92 granted by the 1st respondent and also for an order for prohibition prohibiting the 1st respondent from proceeding further in the hearing of a case of dismissal without just cause or excuse involving the 2nd respondent.

On 30 November 1987, the 2nd respondent was dismissed from the service of the applicant following a domestic enquiry held on 29 June 1987, into 11 specific charges of misconduct.

Dissatisfied, the 2nd respondent made representations to the Director-General for Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 (the Act) for reinstatement to his former position and on 26 November 1988, the Minister of Labour, acting under subsection (3) of the same section, referred the representations to the 1st respondent for adjudication.

On 16 January 1989, the 2nd respondent filed his statement of case with the 1st respondent.

On 7 March 1989, upon the application of Bank Negara Malaysia, the applicant was placed under receivership by an order of Court and Tuan Haji Zainal Abidin Puteh and Tuan Haji Ahmad Kamal bin Abdullah Al Yafii were appointed receivers to manage the affairs and property of the applicant.

Resulting from this, the applicant questioned the jurisdiction of the 1st respondent to continue hearing the case in the absence of leave to be obtained by the 2nd respondent from the High Court and the applicant notified the 1st and 2nd respondents that it would raise this procedural point by way of a preliminary objection before the 1st respondent.

The hearing of the case before the 1st respondent was adjourned many times principally to await the outcome of a related *certiorari* proceedings involving the applicant and its employees in the Kuala Lumpur High Court where the applicant sought to quash an award of the 1st respondent that decided that leave to commence proceedings against a company in receivership was not required.

Eventually, the 1st respondent notified the applicant and the 2nd respondent that the hearing of the case was fixed for 3 days beginning from 17 August 1992 to 19 August 1992.

Both the applicant and the 2nd respondent received the notices of hearing but only the applicant appeared with its solicitor on 17 August 1992, and after standing the matter down for one hour when the 2nd respondent and his solicitor still failed to appear, the 1st respondent handed down its Award No. 222/92 striking out the case.

On being made aware of the Award, the 2nd respondent applied to the 1st respondent on 16 September 1992, to have his case reinstated and to have Award No. 222/92 set aside. On 20 October 1992, the 1st respondent heard the application and in Award No. 346/92 set aside Award No. 222/92 and reinstated the 2nd respondent's case. It is to quash this second award of the 1st respondent that the present proceedings were commenced and the only issue is whether the 1st respondent has the power to act as it did in setting asides Award No. 222/92 and reinstating the 2nd respondent's case for hearing.

The applicant contends that the 1st respondent does not have such a power for the following reasons:

1. The Act itself does not confer such a power. Being a creature of statute, the 1st respondent can only act if empowered to do so by the Act which created it.

2. Award No. 222/92 is final and conclusive as no application was made to challenge it and under s. 33B of the Act, it cannot be challenged, appealed against, reviewed, quashed or called in question in any Court.

3. After striking out the case in Award No. 222/92, the 1st respondent becomes *functus officio,* unless the matter is brought back before it under:

   (i) s. 30(9) of the Act which deals with the rectification of any award under the slip rule.

   (ii) s. 33(1) of the Act which concerns the interpretation of any award.

   (iii) s. 33(2) of the Act which deals with any variation to remove any ambiguity in the award.

   (iv) s. 56(1) of the Act which deals with the non-compliance with the award.

   The 2nd respondent's application for reinstatement does not fall within any of these sections of the Act and this fact is conceded.

4. Although the jurisdiction to strike out the case was derived from s. 29(g) of the Act, the same subsection cannot be relied upon to confer the jurisdiction to have the same matter reinstated, as at the time of the application to reinstate, there were no pending proceedings before the 1st respondent. It is submitted that the subsection is only applicable to pending proceedings.

It is true that the Act does not specifically confer any power to the 1st respondent to reinstate the 2nd respondent's case and unlike the High Court, the 1st respondent is not vested with any inherent jurisdiction to deal with such an application. *Lee Wah Bank Ltd. v. National Union of Bank Employees* [1981] 1 MLJ 169 is the authority for this proposition.

Whilst it is true that s. 33B of the Act regards any award of the 1st respondent to be final and conclusive, this does not oust the High Court reviewing any such award and the only way that can be done is for the 2nd respondent to seek to quash the award by *certiorari* proceedings in the High Court but in order to succeed, he must show that the 1st respondent had acted without jurisdiction or in excess of its jurisdiction. Since it is not disputed that the award was made in the exercise of the 1st respondent's power under s. 29(g) of the Act, there is no way by which the 2nd respondent can quash the Award No. 222/92 by way of *certiorari.* His only remedy is to go back to the 1st respondent to seek reinstatement as the award was made in default of his appearance at the date of the hearing and not on the merits of his case.

In any event, the finality and conclusiveness of any award is subject to the qualifying words "Subject to this Act and the provisions of s. 33A" appearing at the beginning of s. 33B. The provisions of s. 33A of the Act are not relevant but the words "subject to this Act" are very material.

This is so as the 1st respondent is empowered by s. 30(5) of the Act to act according to equity and good conscience without regard to technicalities and legal form. In this instance, the conduct of the 2nd respondent is most relevant to determine whether he can successfully appeal to the good conscience of the 1st respondent to have his case reinstated.

To begin with, why was he and his solicitors absent on 17 August 1992? He has admitted that his solicitors received the notice of hearing sent by the 1st respondent but nevertheless chose not to appear as he had regarded 17 August 1992, to be only a mention date as at that period of time, the issue of leave had not yet been decided by the High Court. Placed under such a mistaken belief, he had concluded that his case would have been postponed in any event.

Under the circumstances of this case, I accept the 2nd respondent's explanation to be a reasonable one as all along the parties had taken the stand that the future conduct of the 2nd respondent's case before the 1st respondent would depend on the outcome of the High Court proceedings regarding leave. It was principally for this reason that all previous hearing dates before 17 August 1992, were adjourned to await the outcome of the High Court proceedings.

There is also the factor that from the time the applicant was placed under receivership, it had taken the stand that the 2nd respondent must obtain leave to prosecute it and such objection would be raised as a preliminary objection at the hearing. Yet on 17 August 1992, in the absence of the 2nd respondent, no such objection was raised by the applicant as seen from the award handed down by the 1st respondent. Instead, the applicant was content to go along with the 1st respondent when the case was struck out, being fully well aware that the proceedings in the High Court for leave was still pending and by so doing, the applicant, I consider, had stolen a march on the 2nd respondent.

Bearing in mind that the object of reinstatement is to give the 2nd respondent an opportunity of being heard, it is only right and equitable that there should be implied in s. 29(g) of the Act the power to reinstate as well. It seems rather absurd that the 1st respondent has the power to strike out a case without its merits being heard but yet has no power to reinstate the same case on good grounds being shown.

In this respect, the order of the High Court in Originating Motion No. 25-2-91 quashing the award of the Industrial Court, which reinstated a wrongful dismissal case, was relied upon by the applicant to show that the 1st respondent had no power to reinstate under s. 29(g) of the Act. The facts of that case, *Carlsberg Brewery Malaysia Berhad v. National Union of Drink Manufacturing Industry Workers* [1990] 2 ILR 468, are distinguishable in that the first Award striking out the case was made following the Union's failure to submit a statement of case following a notice to that effect. The Union was requested to file the statement within 7 days. No action was taken by the Union despite 3 reminders sent to the solicitors of the Union to file a statement of case within one month of the order, failing which the order to strike out will become final. The Union still failed to file the statement before the order to strike out became final. Five months after the expiry of the last extension, the Union wrote to the Industrial Court to reinstate its case and the Industrial Court did so notwithstanding its earlier Award which had already become final.

At the hearing of the *certiorari* proceedings, the Union conceded that the Industrial Court was *functus officio* at the hearing of the application for reinstatement by virtue of the terms of the earlier Award striking out the case, and it was under these circumstances that the order for *certiorari* was granted by the High Court to quash the second Award of the Industrial Court reinstating the case. Clearly the Industrial Court was *functus officio* by virtue of the first Award. The facts of *Carlsberg's* case are completely different from the facts of the instant case before me.

Section 29(g) of the Act is an enabling subsection and the approach that should be adopted when interpreting such provisions is that set out by s. 40 of the Interpretation Act, 1967 to be as follows:

> Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

In the *Lee Wah Bank's* case above, Hashim Yeop A. Sani J., as he then was, in considering s. 40, had this to say of such powers:

> These are powers which are necessarily implied and nothing more. Since the Industrial Court is a creature of the Industrial Relations Act, 1967 its powers must be discovered only from the four corners of the Act - expressly or by necessary implication.

Since s. 29(g) of the Act enabled the 1st respondent to strike out the 2nd respondent's case on 17 August, 1992, without its merits being heard, likewise it is my considered opinion that the power to reinstate the very same case on good grounds being shown can be implied to the subsection and to that end, Award No. 346/92 has been properly made within the framework of the Act.

The 2nd respondent had also questioned the failure of the applicant to file a statement of reply in the proceedings before the 1st respondent but I consider this objection to be a non-issue as the failure is consistent with the applicant's stand that leave must first be obtained before the 2nd respondent can proceed further against it.

Likewise, I regard the objection that the Receivers having been discharged by the High Court on 2 September 1993, on the application of Bank Negara, cannot continue the present proceedings before me, to be also a non-issue.

To begin with, the instant proceedings before me were commenced in January 1993, when the Receivers had not yet been discharged. The Order of Court dated 2 September 1993, also substituted the Receivers with the appointees of Bank Negara. If anything at all and to give effect to the Order, an amendment would be in order, to reflect the proper parties representing the applicant, but in the absence of such an amendment, I consider that nobody had been prejudiced. To that end, I consider the objection on *locus standi* to be a non-issue.

For the reasons I have given, neither *certiorari* nor prohibition can lie to quash Award No. 346/92 and to that end, I had dismissed this originating summons with costs.